No. 83-1739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL UNION NO. 1020, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

TOM J. MCNAUGHTON AND DILLINGHAM CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF AUTHORITIES

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PETITIONER'S REPLY MEMORANDUM[1]

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1. Since the petition for certiorari was filed, the First and Second Circuits have joined five others (*see* Pet. 6) holding that the rule of decision of *DelCostello* v. *Teamsters*, —— U.S. ——, 103 S.Ct. 2281, governs suits which were pending on the date that it was decided. *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (C.A. 1) and *Welyczo* v. *U.S. Air, Inc.*, 733 F.2d 239 (C.A. 2).[2] The decision of the Ninth Circuit of which review

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[1] Throughout this memorandum, "Pet." will refer to the petition for certiorari herein; "Resp. Br." will refer to the Response of respondent, Dillingham Corporation.

[2] In *Graves*, the court expressed the view that the Sixth Circuit agrees with the Ninth, 736 F.2d at 822. This is incorrect; the Sixth Circuit cases discussed in *Graves, id.*, antedate *DelCostello*. See also Pet. 7, n.2.

is sought herein is, therefore, in conflict with that of each of the seven other circuits which have squarely confronted the issue of the "retroactivity" of *DelCostello*.

The fact that a majority of all the Circuits has now taken the opposing position to that of the court below appears to be more pertinent in determining the merits of the petition than the fact, noted by the respondent-employer (Resp. Br. 2-3), that this Court declined to review a prior Ninth Circuit case raising the same issue.

2. As we stressed in the petition (Pet. 7, 11-12) this case is an especially appropriate vehicle for considering whether the *DelCostello* rule is to be given effect in pending cases because the decision below undermines the policy enunciated in *DelCostello* that in a hybrid § 301/fair representation suit the same statute of limitations should apply to the claim against the employer as to the claim against the union. Added force is given to the point by the respondent-employer's decision to oppose certiorari and to defend the Ninth Circuit decision which applies a twenty-day statute of limitations to the suit against the employer and a two-year statute to the suit against the union (Resp. Br. 4-8). The employer thus makes common cause with the plaintiff to retain the union's potential liability, although it was the employer's decision to discharge him which caused the only damage against which the plaintiff complains.[3] Under these circumstances the union can expect little cooperation from the employer at trial when, as the lone remaining defendant, it seeks to sustain the reasonableness of that discharge, and its decision not to prosecute the grievance. Moreover, while the employer defends the equity of this result, it fails to address the point made in the petition (p. 13) that if the plaintiff had brought his action within six months, the claim would have been timely against *both* defendants under *DelCostello*.

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[3] The complaint does not allege that the union harmed plaintiff except by failing to process his grievance against the discharge, with the result that it was not arbitrated. See Pet. 4-5.

On the merits, the employer does not attempt to defend the Ninth Circuit's application of the *Chevron* factors. Rather it seeks to evade a *Chevron* analysis, stating that "separating the *Chevron* factors and microscopically analyzing each does not necessarily advance the search for the proper conclusion." (Resp. Br. 3). We agree fully with the statement in *Simpson v. Director*, 681 F.2d 81, 85 (C.A. 1) quoted at Resp. Br. 4, but respondent misunderstands its meaning. The *Simpson* court did not disavow the *Chevron* factors; it engaged in a meticulous analysis of the retroactivity problem before it in light of those factors, 681 F.2d at 86-90. The court concluded that "when the situation is analyzed in light of *Chevron Oil's* three factors, we are not persuaded that [the case whose retroactivity was at issue] was decided in the face om such widespread justifiable reliance [on prior contrary law] as to overcome *the general presumption of retroactivity.*" (*Id.* at 90, emphasis added). The same is true here, see Pet. 9-10. As *DelCostello* explained, the Court there did not overrule any prior precedent or make a "clear break" with prior decisions. Because the prior law did not create the justifiable reliance which is a prerequisite to nonretroactivity, summary reversal may be appropriate.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and herein, the Petition should be granted.

Respectfully submitted,

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